8-13-2012

State v. Cornelison Appellant's Brief Dckt. 39616

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39616
	)	
v.	)	
	)	
JESSE SCOTT CORNELISON,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Cornelison timely appeals from the district court's order revoking probation. On appeal, Mr. Cornelison argues that the Idaho Supreme Court denied him due process and equal protection when it refused to augment the record with various transcripts Mr. Cornelison requested to be created at the public's expense. Mr. Cornelison also argues that the district court abused its discretion when it revoked probation and failed to further reduce the length of his sentence.

Statement of the Facts and Course of Proceedings

Mr. Cornelison and his cousin were sneaking alcoholic beverages at their parents' Christmas party. (Presentence Investigation Report (*hereinafter,* PSI), p.2.) After their parents put up the alcohol, Mr. Cornelison and his cousin broke into the back of a restaurant and stole some beer and cigarettes. (PSI, p.2.) Mr. Cornelison was charged, by Information, with one count of burglary and one count of petit theft. (R., p.12.) Pursuant to a plea agreement, Mr. Cornelison pleaded guilty to burglary and, in return, the State dismissed the petit theft charge. (R., pp.17-18, 24.) Thereafter, the district court held sentencing in abeyance, entered a withheld judgment, and placed Mr. Cornelison on probation. (R., pp.23-36.)

After a period of probation, the State filed a motion to revoke probation and a report of probation violation, wherein it alleged that Mr. Cornelison violated various terms of his probation. (R., pp.41-46.) Mr. Cornelison then admitted to violating the terms of his probation by failing to complete treatment. (R., p.49.) Thereafter, the district court revoked the withheld judgment, imposed a unified sentence of five years,

with two years fixed, but retained jurisdiction. (R., pp.52-59.) Upon review of Mr. Cornelison's period of retained jurisdiction (*hereinafter*, rider), the district court suspended the sentence and placed him on probation again. (R., pp.63-66.)

After a period of probation, the State filed a motion to revoke probation and a report of probation violation, wherein it alleged that Mr. Cornelison violated various terms of his probation. (R., pp.73-77.) Mr. Cornelison admitted to violating the terms of his probation by consuming alcohol. (R., p.86.) The district court revoked probation and executed the underlying sentence, but retained jurisdiction again. (R., pp.91-96.) Upon review of Mr. Cornelison's second rider, the district court suspended the sentence and placed him on probation for a third time. (R., pp.100-103.)

After a period of probation, the State filed a motion to revoke probation, wherein it alleged that Mr. Cornelison violated the terms of his probation. (R., p.109.) Mr. Cornelison admitted to violating the terms of his probation for failing to complete daily intox and changing his residence without prior approval. (R., p.117.) The district court revoked probation, continued the disposition of the probation violation for a period of six months, and released Mr. Cornelison on his own recognizance. (R., pp.117-118.) Six months later, the district court suspended the sentence and placed Mr. Cornelison on probation for a fourth time. (R., pp.119-125.)

After a period of probation, the State filed a motion to revoke probation and a report of probation violation, wherein it alleged that Mr. Cornelison violated various terms of his probation. (R., pp.131-134.) Mr. Cornelison admitted to violating the terms of his probation for leaving the scene of an accident after hitting a road fixture, driving without insurance, failing to report to his probation officer, using marijuana, and failing to pay costs of supervision. (12/13/11 Tr., p.15, L.14 – p.18, L.21.) Thereafter, the district

court revoked probation and executed the underlying sentence, but *sua sponte* reduced the sentence to four years, with one year fixed. (R., pp.138-144.) Mr. Cornelison timely appealed. (R., pp.145-148.)

On appeal, Mr. Cornelison's appellate counsel filed a motion to augment the record with various transcripts and to suspend the briefing schedule pending the preparation of those transcripts. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof (*hereinafter,* Motion to Augment), pp.1-5.) The State objected to Mr. Cornelison's request for the transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof" (*hereinafter,* Objection to Motion to Augment), pp.1-4.) Thereafter, the Idaho Supreme Court entered an order denying Mr. Cornelison's request for transcripts of the admit/deny hearing, held on March 2, 2006, the disposition / sentencing hearing, held on March 21, 2006, the rider review hearing, held on August 29, 2006, the admit/deny hearing, held on June 5, 2007, the disposition hearing, held on June 26, 2007, the rider review hearing, held on October 30, 2007, the admit/deny hearing, held on January 15, 2008, and the disposition hearing, held on July 8, 2008. (Order Denying Motion to Augment and Suspend the Briefing Schedule (*hereinafter,* Order Denying Motion to Augment), p.1.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Cornelison due process and equal protection when it denied his Motion to Augment with the requested transcripts?

2. Did the district court abuse its discretion when it revoked Mr. Cornelison's probation?

3. Did the district court abuse its discretion when it failed to reduce Mr. Cornelison's sentence *sua sponte* upon revoking probation?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Cornelison Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With Necessary Transcripts

A. Introduction

A long line of United States Supreme Court cases hold that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. In the event the record reflects a colorable need for a transcript, the only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues raised on appeal.

In this case, Mr. Cornelison filed a Motion to Augment, requesting various transcripts, wherein he argued that, when determining whether to revoke probation, a district court can consider all of the prior hearings. That motion was denied by the Supreme Court. On appeal, Mr. Cornelison is challenging the Idaho Supreme Court's denial of his request for the transcripts outlined in the Statement of Facts and Course of Proceedings, *supra*. Mr. Cornelison asserts that the requested transcripts are relevant to the issues of whether the district court abused its discretion in revoking probation and imposing an excessive sentence because the district court could rely on its memory of the requested hearings when it revoked probation. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court Denied Mr. Cornelison Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With The Necessary Transcripts

1. The Idaho Supreme Court, By Failing To Provide Mr. Cornelison With Access To The Requested Transcripts, Has Denied Him Due Process Because He Cannot Obtain A Merit Based Appellate Review Of His Sentencing Claims

The constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; IDAHO. CONST. art. I §13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a transcript, the cost of such transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to

"order a transcript to be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting the substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983).

The United States Supreme Court has issued a long line of cases that directly address whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant trial proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with an appellate record unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois,* 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost." *Griffin*, 351 at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts

themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process or equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations and footnotes omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective merits-related appellate review. At the same time, the Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet adequate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of a defendant's indigency. In that case, the State argued that the defendant had already received appellate review of his conviction by the Ohio appellate court. *Burns*, 360 U.S. at 257. The United States Supreme Court rejected this argument and ruled that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *State v. Draper*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining access to transcripts based on a frivolousness standard. "Under the present standard, . . . they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 372 U.S. 494. The Supreme Court first expanded upon its statement in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement when stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised for appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it was held that a defendant need only make a colorable argument that he/she needs items to create a complete record on appeal. *Id.* at 195. If the State wants to deny the defendant's request, it is the State's burden to prove that the requested items are not necessary for the appeal. *Id.*

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardener v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

An application of the foregoing rules to the facts of this case creates a situation analogous to *Lane v. Brown*, 372 U.S. 477 (1863). In that case, a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly, in Idaho, an appellant must provide an adequate record or face procedural default. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (citing *State v. Beck,* 128 Idaho 416, 422 (Ct. App. 1996); *State v. Beason,* 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko,* 108 Idaho 872, 873 (Ct. App. 1985); *State v. Repici,* 122 Idaho 538, 541

(Ct. App. 1992)). If the transcripts are missing, but the record contains court minutes, that may be sufficient so that a "meaningful review of [an appellant's] claim is possible, although the Idaho Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide an adequate record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Cornelison fails to provide the appellate court with the requested items, the legal presumption will apply and Mr. Cornelison's claims will not be addressed on their actual merits. If it is state action alone, which prevents him from access to the requested items, then such action is a violation of due process, as per *Lane*, and any such presumption should no longer apply.

Whether the transcripts of the requested proceedings were before the district court at the time of the probation revocation hearing is not relevant in deciding whether the transcript is relevant to the issues on appeal because in reaching a sentencing decision, a district court is not limited to considering only that information offered at the hearing from which the appeal is filed. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak,* 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon "the number of certain types of criminal transactions that [the judge] has observed in the courts within his judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected

to disregard what he already knew about Gibson from the other case"). Thus, whether the prior hearings were transcribed or not is irrelevant, because the court may rely upon the information it already knows from presiding over the prior hearings when it made the decision to revoke probation.

The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, Docket No 39057, 2012 Opinion No 38 (Ct. App. 2012) (not yet final), which addressed the foregoing argument. In that case, the defendant pleaded guilty and was placed on probation. *Id.* at 1. After a period of probation, the defendant admitted to violating the terms of his probation and the district court revoked probation but retained jurisdiction. *Id.* at 1-2. After completing the rider, the district court placed the defendant on probation. *Id.* at 2. The defendant admitted to violating the terms of his probation and the district court revoked probation. *Id.* The defendant appealed from the district court's second order revoking probation. *Id.*

On appeal, the defendant filed a motion to augment the appellate record with transcripts associated with his first probation violation and disposition, which was denied by the Idaho Supreme Court. *Id.* The defendant then raised as issues on appeal the question of whether the Idaho Supreme Court denied him due process and equal protection when it denied the motion to augment and the issue of whether the district court abused its discretion when it revoked probation. *Id.* at 2-3. The Idaho Court of Appeals held that the transcripts of the prior probation proceedings were not necessary for the appeal because "they were not before the district court in the second probation violation proceedings, and the district court gave no indication that it based its revocation decision upon anything that occurred during those proceedings." *Id.* at 4.

While *Morgan* does directly deal with the issues raised in this appeal, at this point

this case is not final. Moreover, it is distinguishable because Mr. Cornelison is challenging not only the order revoking probation, but also the length of his sentence, which entails an analysis of the district court's sentencing rationale.

Additionally, the requested items are within an Idaho appellate court's scope of review. The requested transcripts are relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court made appropriate sentencing determinations. *See State v. Hanington,* 148 Idaho 26, 28 (Ct. App. 2009) ("When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." (emphasis added)).[1]

Further support for Mr. Cornelison's position can be found in *State v. Warren*, 123 Idaho 20 (Ct. App.1992). In that case, Mr. Warren was convicted of aggravated battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then

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[1] In *Morgan*, *supra*, the Court of Appeals clarified the scope of review articulated in *Hanington.* Specifically it held:

> In reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal."

Morgan, at 4. (original emphasis). As stated above, *Morgan* is not a final opinion and Mr. Cornelison is raising a sentencing claim in this appeal.

battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of retained jurisdiction, Mr. Warren was placed on another period of probation, which was ultimately revoked. *Id.* The district court then *sua sponte* reduced the length of Mr. Warren's sentence. *Id.* Mr. Warren then appealed and alleged that the district court should have further reduced the length of his sentence. *Id.* In support of that position, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear." *Id.* However, the Court of Appeals did not address the merits of his sentence reduction claim because he failed to provide a transcript of the original PSI and a transcript of the original sentencing hearing. *Id.* Even though the original sentence was not on appeal, and happened years before the decision at issue, the Idaho Court of Appeals held that the transcript was necessary to address Mr. Warren's claims of error. Moreover, there was no indication that a transcript of that hearing was created before the probation violation hearing or that the district court referenced the original sentencing hearing at the probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. Had Mr. Cornelison failed to request the transcripts at issue, the *Warren* opinion indicates that it would be presumed to support the district court's decision to execute the original sentence.

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny indigent defendants transcripts of trial

proceedings on appeal. The decision to deny Mr. Cornelison's request for the transcripts will render his appeal meaningless because it will be presumed that the missing transcripts support the district court's sentencing decisions. This functions as a procedural bar to the review of Mr. Cornelison's appellate sentencing claims on the merits, and therefore, Mr. Cornelison should either be provided with the requested transcripts or the presumption should not be applied.

2. The Idaho Supreme Court, By Failing To Provide Mr. Cornelison With Access To The Requested Transcripts Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Sixth Amendment right to counsel in the context of death penalty cases was selectively incorporated to the states through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In coming to this conclusion, the United State Supreme Court reasoned that the ability to be heard by counsel is so inextricable related to due process that the denial of counsel is tantamount to the denial of a hearing. *Powell*, 287 U.S. at 69. The Supreme Court also stated that under the facts of *Powell* "the necessity of counsel was so vital and imperative that the failure to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . [to] hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.* at 71-72.

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and is progeny and determined that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants the right to counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the protection of

Douglas was extended to the right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California,* 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he support his client's interest's to the best of his ability." *See also Banuelos v. State,* 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcripts prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is a factual support either in favor of any argument made or undercutting an argument. Therefore, Mr. Cornelison has not obtained review of the court proceedings based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau,* 116 Idaho 129, 137 (1989) (o*verruled on other grounds by State v. Card,* 121 Idaho 425 (1991)), the Idaho Supreme Court held that the starting point for evaluating whether counsel renders effective assistance of counsel in a criminal action is the American Bar Association, Standards For Criminal

Justice, The Defense Function. These standards offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b). In the absence of access to the requested transcripts, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's decision to revoke probation. Further, counsel is unable to advise Mr. Cornelison on the probable role the transcripts may play in the appeal.

Mr. Cornelison is entitled to effective assistance of counsel in this appeal, and effective assistance cannot be given in the absence of access to all of the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Cornelison his constitutional right to due process which includes a right to the effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcripts and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Cornelison's Probation

Mr. Cornelison asserts that, given any view of the facts, the district court abused its discretion when it revoked his probation. When a defendant appeals from an order revoking probation the Idaho Court of Appeals has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct. App. 1987).

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Mr. Cornelison concedes that he violated the terms of his probation. Accordingly, he only contests the district court's decision to revoke her probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with the protection of society." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001).

Even though Mr. Cornelison was struggling with probation, there was a consensus between the parties that revocation of probation was not warranted in this matter. In fact, the prosecuting attorney, the Idaho Department of Correction, and Mr. Cornelison's probation officer all recommended 180 days of county jail time and had not objections to work release. (01/10/12 Tr., p.23, L24 – p.24, L.9.)

Additionally, Mr. Cornelison's family needs his emotional and financial support. He was employed at the time of the probation violation disposition hearing. (01/10/12

Tr., p.10-11.) He also has two sons and his girlfriend was a fulltime college student. (01/10/12 Tr., p.25, Ls.8-15.)

In light of the foregoing information the district court abused its discretion when it revoked probation.

III.

The District Court Abused Its Discretion When It Failed To Further Reduce Mr. Cornelison's Sentence *Sua Sponte* Upon Revoking Probation

Mr. Cornelison asserts that, given any view of the facts, his unified sentence of four years, with one year fixed, is excessive. Due to the district court's power under I.C.R. 35 to reduce the length of the original sentence *sua sponte* upon the revocation of probation, on appeal an appellant can challenge the length of the sentence as being excessive. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Cornelison does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Cornelison must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the

individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

As a preliminary matter, Mr. Cornelison incorporates the arguments made in section I, *supra*, herein by reference thereto.

There are various mitigating factors present in this matter which support the conclusion that Mr. Cornelison's sentence is unduly harsh. Specifically, the instant offense is Mr. Cornelison's first felony. (PSI, p.3.) Mr. Cornelison has been diagnosed with ADHD. (PSI, p.5.) Mr. Cornelison has support from his immediate and extended family. (PSI, pp.3-4.) Mr. Cornelison expressed his remorse for the victims and for the trouble he has caused his family. (PSI, p.8.)

Mr. Cornelison's positive rider performance should also be viewed as mitigating evidence. While on his first rider, Mr. Cornelison completed all the requirements for a food handler's card from the Idaho Department of Health and Welfare. (2006 Addendum to the Presentence Investigation Report (*hereinafter,* APSI), p.2.) He also volunteered his time to perform extra duties on several occasions. (2006 APSI, p.2.) Mr. Cornelison displayed a "willingness to provide dependable, quality service in his employment . . . . " (2006 APSI, p.2.) While on his second rider, Mr. Cornelison was active in the New Directions program, and held himself accountable for his actions. (2007 APSI, p.2.) Mr. Cornelison was more successful on his second rider than his first rider. (2007 APSI, p.3.)

When the mitigating factors in this matter are viewed in light of Mr. Cornelison's positive rider performance, they support the conclusion that the district court abused its discretion when failed to further reduce the length of his sentence.

CONCLUSION

Appellate counsel respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Cornelison respectfully requests that this Court remand this matter with instruction to place Mr. Cornelison on probation. Alternatively, Mr. Cornelison respectfully requests that this Court reduce the length of the indeterminate portion of his sentence.

DATED this 13th day of August, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of August, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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